TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT	6
CONCLUSION	21
APPENDIX A	22

TABLE OF CITATIONS

CASES:

Atchison, Topeka & Santa Fe Railway Co., et al. v. United States and Interstate Commerce Commission, Civil Action No. 64C-1442	14
Cleveland, C. C. & St. L. R. Co. v. Dettlebach, 239 U.S. 588 (1916)	19
Interstate Commerce Commission v. Detroit & C. Ry. Co., 167 U.S. 633	17
Kansas City S. R. Co. v. United States, 282 U.S. 760 (1931)	19
Louisville & N. R. Co. v. Mottley, 219 U.S. 467 (1911)	19
Louisville & N. R. Co. v. United States, 282 U.S. 740 (1931)	19
National Motor Freight Traffic Association, Inc., et al. v. United States, et al., 371 U.S. 223 (1962) and 372 U.S. 246 (1963)	17, 18
New Automobiles in Interstate Commerce, 259 I.C.C. 475 (1945)	17
Railroad Ret. Bd. v. Duquesne Warehouse Co., 326 U.S. 446 (1945)	5
Southern R. Co. v. Prescott, 240 U.S. 632 (1916)	19
Ex Parte 230, Substituted Service—Piggyback, 322 I.C.C. 301 (1964)	14, 15, 16
Union Pacific R. Co. v. Goodridge, 149 U.S. 680 (1893)	19
United States v. Baltimore and Ohio R. Co., 333 U.S. 169, 175 (1948)	19
United States v. Chicago Heights Trucking Co., 310 U.S. 344 (1940)	19
United States v. Interstate Commerce Commission, 352 U.S. 158	17

Page

STATUTES:

Interstate Commerce Act (49 U.S.C. 1 et seq.):

Section 2 18
Section 3 18
Section 6 ..... 17, 18
Section 15(13) 2, 6, 12, 13, 17, 18
Section 415 18

MISCELLANEOUS:

Elkins Act, 49 U.S.C. 41 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 159

COOPER-JARRETT, INC., ET AL, *Appellants*

v.

THE UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal From the United States District Court For the Western District of Missouri

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

STATEMENT

Appellant. Cooper-Jarrett, Inc., and the other appellants named in Appendix A hereto oppose the Motions to Affirm the judgment of the court below.

For the most part appellants' case is adequately presented in the Jurisdictional Statement, and thus the Motions to Affirm, by their obvious misconception of appellants' arguments and misunderstanding of basic

questions presented, serve to bring into sharp focus rather than to diminish the critical importance of the issues. To simplify reference to the individual motions we will distinguish between the appellees by referring to the United States and Interstate Commerce Commission as the Government and to the remaining appellees as the intervenors.

At page 3 of the Government motion it is asserted that appellants here contend that TOFC Plans III and IV are unlawful *per se* because the provisions of Part I of the Interstate Commerce Act [49 U.S.C. § 1 et seq.] prohibits rail carriers from offering a partial service. A statement of similar import appears at page 6 of the intervenors' motion, and the Government adds to its erroneous assertion the further statement that appellants contend that shippers may not furnish any part of the facilities or services of transportation. But appellants make no such contention, fully recognizing that the railroads may lawfully perform a partial service and that shippers may furnish some portion of the facilities or equipment necessary to the transportation of their goods. Appellants' position in this case is that the railroads, having established rates for the computation of charges for the performance of a complete TOFC service, may reduce the charges to be assessed for partial services only pursuant to allowances reflecting the shippers contribution to the service published in tariffs as required by Section 15(13) of the Act [49 U.S.C. § 15(13)]. In failing to recognize the position of the appellants, both groups of appellees fail to treat the vital legal issue which this Court is here asked to decide.

While there are other misstatements in the motions of both the Government and the intervenors, only one

is of enough significance to require clarification. At page 6 of its motion, the Government attempts to equate Plan I TOFC with Plan III TOFC by suggesting that in Plan I the railroads hold out a partial service which is comparable to that named in the Plan III tariffs and that the motor carriers by opposing Plan III are attempting to limit the ability of the railroads to compete. This statement is both unfair and inaccurate. There is no legitimate similarity between Plan I and Plan III, because in Plan I the only service held out to the public is a complete door-to-door service and the holding out is for the joint performance of such service by a motor carrier and a railroad. To the extent that there is any purpose in this case in attempting to categorize the various TOFC plans, it is submitted that Plans I and V may be distinguished from Plans II, III and IV in that the first group consists of service performed by motor carriers and railroads, pursuant to a joint rate while the second group consists entirely of all-rail service offered directly to the shipping public. There is no issue in this case as to the right of any carrier to participate in or physically perform TOFC service on either a complete or a partial basis. The basic issue is whether carrier charges may be varied dependent upon shipper contribution or noncontribution to service in a manner other than that provided by law.

As is true in most important cases, the area of conflict between the parties may be stated in various ways. In the motion of the intervenors the basic issue is succinctly, if unintentionally, summarized in a fashion which fairly states not only the position of those intervenors but also that of the Government:

> "Ordinarily, having published a rate without qualification, the railroad is obliged, upon reason-

able request, to provide whatever 'instrumentalities' are necessary to perform the transportation. *General Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 428 (1940). Thus under the Plan II tariffs, the railroad contracts for a complete door-to-door service, including trailer and drayage, on a given commodity. Under the Plan III tariffs, however, the railroad only contracts to move a large package of freight for the shipper between designated ramp points, the 'package' in this instance taking the form of a trailer.

"It matters not from what source the shipper procures the outer package. Some own their own trailers, some lease from outside sources and some lease from railroad trailer-leasing subsidiaries. As long as the railroad does not undertake to provide the shipper's package as part of the applicable Plan III tariff undertaking, however, the package (or trailer) is not an 'instrumentality' as that term is used under Sections 1(3) and 15(13) of the Act." [Intervenors motion, p. 11]

In short, the intervenors urge that the railroads should be free to "contract" their transportation services in accordance with what they elect to publish in their tariffs regardless of other tariffs applicable on the same traffic, between the same points, at the same time. Even more startling is the theory that an instrumentality of transportation acquires or loses its identity solely in accordance with the description of the services and facilities to be provided under one of two or more tariff rates for TOFC service. They go still further to insist that when such description does not include the provision of the instrumentality, a shipper may lawfully lease it from a railroad subsidiary and qualify for a rate limited to shipments in trailers furnished by shippers. The contention is diametrically contrary to the unambiguous holding of the Supreme

Court in *Railroad Ret. Bd.* v. *Duquesne Warehouse Co.*, 326 U.S. 446 (1945) wherein at pages 453-454 the Court said:

> "Duquesne's answer is that the service of loading and unloading is done by it for its customers, *that these services are rendered before railroad transportation has begun or after it has ended, that they are not and cannot be a part of railroad transportation since the tariff of the Pennsylvania forbids it from performing the services.* Duquesne's conclusion is that under such circumstances loading and unloading are not and cannot be a part of railroad transportation. *The question, however, is not whether in these cases the service of loading and unloading is being rendered by the Pennsylvania and is, therefore, in fact a part of its transportation service.* It is not whether the affiliate would itself be subject to the Interstate Commerce Act. *It is whether a carrier's affiliate is performing a service that could be performed by the carrier and charged for under the line-haul tariffs.* If it is such a service, it is a transportation service within the meaning of the present Acts." [Emphasis added]

The services and the instrumentalities by which Plan III and Plan IV are converted into Plan II are just as much transportation facilities and transportation services as is the physical act of line-haul movement, are all within the regulatory reach of the Interstate Commerce Act, and may not be provided by the railroads or their subsidiaries except in full compliance with the provisions of that statute.

ARGUMENT

From the very inception of this case, these appellants have argued simply that once having elected to provide a complete service and once having published the rates and charges therefor, as the railroads have done with respect to TOFC service (Plan II), the only way that a less-than-complete service can be rendered and the shippers compensated for their contribution of the remaining instrumentalities or services necessary to complete the transportation is through allowances as provided in Section 15(13) of the Interstate Commerce Act [49 U.S.C. § 15(13)]. As is apparent from the discussion by the Interstate Commerce Commission in its original disposition of this entire matter, the issue was squarely before it and fully understood. The Commission said (J.S. 77a-78a):

> "In their reply to the railroads' exceptions, certain of the motor-carrier interests state:
>
> 'the issue here presented is simply a question of whether the means which the railroads have chosen for rendering less than a complete TOFC service are lawful.
>
> * * * * * * * * *
>
> 'It is the contention of the motor carrier protestants that in view of the provisions of the Interstate Commerce Act requiring the railroads to furnish the instrumentalities of transportation, to strictly observe their published tariff charges, and permitting them to compensate shippers through allowances published in tariff form for rendering some portion of the service which the railroads are obligated to perform, the instant proposals are unlawful.'
>
> "In substance, the examiner concluded in the proposed report in the eastern and western cases that the railroads, having established plan II rates

and charges for a complete, door-to-door TOFC service, may provide lesser services only by publishing tariff allowances to shippers who furnish a part of the instrumentalities and services which the carriers otherwise are obligated to furnish. Eastern Central insists that there is no justification for the maintenance of two sets of rates, one contemplating the provision of all instrumentalities and services and the other contemplating the furnishing of certain instrumentalities and services by the shipper.

"We are not in agreement with that position. The argument draws its principal support from evidence that under plan III and plan IV operations there has been some direct and indirect leasing of trailers and cars by certain railroads to shippers and the performance of loading and unloading of lading into and out of trailers, or of drayage services at negotiated charges. In any instances in which the carriers, having established plan II rates, performed a complete door-to-door service and charged only plan III or plan IV rates, the latter obviously were inapplicable and the railroads should collect undercharges on the basis of the applicable plan II rates and charges. While the furnishing of services which they do not hold themselves out to perform can be the source of illegal rebating by carriers for which they are liable to prosecution under the Elkins Act, nevertheless it cannot be said that carriers are barred from publishing rates for less than a so-called complete service. Many motor carriers, for example, publish rates subject to consignor loading and consignee unloading which services are normally included in motor rates. The fact that rates are published for a complete service does not prevent a carrier from offering to perform a lesser service for a lower rate. Nor, when that is done, can it be said that the carrier is 'obligated' to do more than it has offered to do for the lower rate where such

> offer at the latter rate is accepted by the shipper. With respect to 'allowances,' obviously none can be made to the shipper for performing a service the avoidance of which is the consideration for the lower rate."

Throughout the motion of the Government as well as that of the intervenors it is apparent that those parties fail to perceive that there is a distinction between a rate and a charge, and this failure on their part perhaps explains the misconception of the arguments of these appellants and of the importance of the issues in this case. Thus, at page 6 of their motion, the intervenors appear to suggest inconsistency in the position of appellants by referring to appellants' statement that a railroad may maintain both a complete service and a partial service, assessing lower charges for the latter, and in the same paragraph insisting that appellants' argument here is that the rail carriers must hold themselves out to furnish all facilities and all services of transportation in all instances. The latter portion of the intervenors' statement is incorrect for what the appellants have consistently argued throughout the case is that charges for the two services, i.e., the complete service and the partial service, must stem from the same rate. That is to say, the charges for the complete service are computed by application of the appropriate rate to a particular shipment and, if the requirements of the Act are to be met, the charges for the incomplete service must be computed in the same manner less whatever allowance is provided to reflect the performance by the shipper of a part of the complete service. To finally eliminate any lingering vestiges of misunderstanding, it should be noted that these appellants do not contend that the railroads must offer a complete door-to-door TOFC service.

References herein to complete service are based upon the fact that the railroads have elected to offer such service, and appellants simply insist that having done so, lesser charges for variations thereof may be accorded shippers only pursuant to the provision of the Act adopted by Congress for that very purpose.[1]

The proper resolution of the basic issue raised in this case is of tremendous importance as can readily be perceived by placing in juxtaposition two statements of the Commission in its report. First, in defining Plan III the Commission said:

> "Under plan III service, the shipper provides the trailers (or containers) which he owns or leases. He delivers the loaded trailers to the rail loading ramp and arranges for their movement from the unloading ramp at the delivery point. The railroad loads the trailers onto the flatcar at origin, performs the line-haul service, and unloads the trailers from the flatcars at the rail terminal. The railroad charge is stated in amounts per flatcar, a charge of the same amount applying in the opposite direction, whether the trailers are empty or loaded. *Plan III thus eliminates pickup and delivery expense, acquisition, maintenance, and depreciation charges for trailers and all empty return mileage.* The railroad pays no rental charge for the trailers, and no refrigeration, ventilation, or other protective services are furnished." [J.S. 25a. Emphasis supplied]

That the foregoing description has almost no relevance to the actual practice of the railroads under

---

[1] For any generic type of service, i.e. boxcar, TOFC, etc., appellants contend that only one rate—that for the most complete service offered—may be maintained. Charges for variations thereof may be adjusted by allowances from the rate.

Plan III is plain from the further finding of the Commission:

"*Other services.*—Several railroads, including the Pennsylvania, Baltimore & Ohio, The Atchison, Topeka and Santa Fe Railroad Company, and Chicago, Burlington & Quincy Railroad Company, have performed for freight forwarders the loading and unloading of lading into and out of trailers moved in plan III or plan IV service. Several eastern railroads, including the New York Central, Pennsylvania, Lackawanna, Nickel Plate, Lehigh Valley, and Baltimore & Ohio, have leased, either directly or indirectly through subsidiaries, trailers or flexi-vans on a trip-lease basis to shippers, including freight forwarders and shipper associations. In addition, some railroads, including the New York Central and Pennsylvania, either directly or indirectly through subsidiaries, perform the cartage of the trailers between the shippers' places of business and the railroads' ramp locations. The railroads have found that the utilization of their trailers in plan III service through trip-lease arrangements has had the effect of reducing their empty trailer-miles, as it enables the 'interweaving' of plan II and plan III trailer utilization. The reduction results principally because the railroads, including their subsidiaries, generally lease only their surplus trailers, and, as in the case of the Pennsylvania, only to shippers desiring to make use of the trailers to destinations at which the Pennsylvania wants them.

"In addition to the trip lease of trailers by the railroads, including their subsidiaries, to shippers for use in plan III, the Lackawanna has trip leased the trailers of a shipper, Swift and Company. The traffic of the latter moves eastbound only, and to avail itself of plan III service it has leased trailers both on a trip-lease basis and on a round trip basis. When the leases are on a round trip basis it has

subleased the trailers to the Lackawanna also for the return westbound movement." [J.S. 33a-34a]

It may be here observed that the illegality inherent in Plans III and IV does not lie in the quantum of physical service rendered or not rendered, but rather in the holding out to the public of this limited or truncated TOFC service independent of and concurrent with the holding out of complete TOFC service. In this situation, when the truncated service is converted into a complete service through the provision of the necessary additions either directly by the railroads or through their subsidiaries, there is a manifest ability to manipulate rates and charges by assessing either the complete service rate or the truncated service charge plus some assessment for the rail-furnished additions. And it is here that the practical vice is found. The opportunity for discriminatory practices is not only too great to resist but it is also so intimately related to daily operating routine as to become a virtual part thereof.

The Commission itself perceived the vice inherent in the maintenance of rates for a type of service and the concurrent maintenance of an unrelated rate for a variation of that type of service when it found that:

> "* * * In any instances in which the carriers, having established plan II rates, performed a complete door-to-door service and charged only plan III or plan IV rates, the latter obviously were inapplicable and the railroads should collect undercharges on the basis of the applicable plan II rates and charges. While the furnishing of services which they do not hold themselves out to perform can be the source of illegal rebating by carriers for which they are liable to prosecution under the Elkins Act, nevertheless it cannot be

> said that carriers are barred from publishing rates for less than a so-called complete service. * * *" [J.S. 78a]

The serious deficiency in the Commission's decision, which is compounded by the court below and which permeates the arguments of the appellees, is that railroads do hold themselves out to provide all instrumentalities and perform all services necessary to a complete door-to-door TOFC transportation. That is to say, the Plan III and IV charges which are the direct subject of the case cannot be considered in isolation but must be evaluated in light of the transportation context of which they are a part. As an abstract proposition it may well be that carriers are not barred from publishing rates for a less-than-complete service, but in this case the carriers *have* published rates covering complete service and the vital question is whether they may *also* concurrently publish separate and unrelated rates for a part of that service in a fashion other than that specified in the Act itself.

There is no question but that a shipper may perform some part of a transportation service and there is no question but that when he does so the total charge assessed therefor by a carrier may be less than the charge which would be assessed if the carrier performed the entire service. But this does not mean that the carrier may maintain completely separate rates with one schedule applying for the complete service and a different schedule for the partial service. Section 15(13) of the Act [49 U.S.C. § 15(13)] explicitly provides that when a shipper furnishes a part of a transportation service his compensation therefor shall be published as an allowance or deduction from the rate which would otherwise be applied by the carrier

to compute the charge for the service. To hold, as did the Commission and the court below, that Section 15(13) has no application because the tariffs naming the Plan III and IV charges limit the railroads' holding out so that no allowance could be made for the furnishing of trailers or of pick-up and delivery service because they are beyond the transportation obligation of the carriers where such obligation is accepted and established by the Plan II tariffs is to hold that the railroads may depart from the requirements of the Act and may indulge in preference, prejudice, discrimination, and rebating by simply publishing appropriate provisions in some one or another of their tariffs. If this be the present state of the law it is imperative that it be so declared by this Court for the thousands of carriers engaged in the performance of transportation under the Interstate Commerce Act are entitled to know that they need no longer concern themselves with adhering to the explicit commands of that Act.

The very findings by the Commission that under Plans II, III, and IV, shippers look to the railroads or their subsidiaries for the provision of trailers and pick-up and delivery services are demonstrative of the complete frustration of Congressional purpose which must occur if the component parts of a transportation service are considered as subject to regulation under one tariff but not so subject under another tariff. And it does not aid appellees' cause for them to say (Government's motion page 8, intervenors' motion page 6), that because the Commission in a later proceeding has endeavored to assert jurisdiction over the "ancillary" equipment and services necessary to convert partial TOFC service into complete TOFC service the Com-

mission did not err in the decision here under review. The fact of the matter is that the Commission's own discussion in Ex Parte No. 230, *Substituted Service—Piggyback*, 322 I.C.C. 301 (1964)[2] is convincing that the publication of separate rate schedules for the performance of various degrees of TOFC service instead of the maintenance of a single rate schedule with reductions therefrom for the performance of lesser service will utterly thwart achievement of the very purposes underlying the regulation of transportation. At pages 369-370, the Commission said:

> "* * * *Under present rate publication practices, it would be possible for a railroad to offer what amounts to exactly the same service in a variety of ways.* A shipper wishing to use TOFC service obviously expects the railroad to provide the line-haul transportation. Let us assume a situation in which such a shipper also expects the railroad to provide the trailer, but plans itself to load the trailer and to move it to the railroad's TOFC terminal. It expects the railroad to perform the necessary loading, securing, and unloading of the trailers, and it also wishes the railroad to deliver the trailer to the consignee's door and to unload it. This shipper might well be able to obtain the service it wants under two separate rates: a door-to-door rate (plan II) minus allowances for shipper loading and drayage at origin; or a ramp-to-ramp rate (plan III) plus charges for the railroad's providing the trailer and drayage and unloading at destination.
>
> "It is apparent that this state of affairs places a preminum [sic] on a shipper's having a sophisti-

[2] The decision has been appealed by the railroads to the United States District Court for the Northern District of Illinois in Civil Action No. 64C-1442, *Atchison, Topeka & Santa Fe Railway Co. et al. v. United States and Interstate Commerce Commission.*

cated traffic department, capable of assessing the various available services, charges, and allowances, and of determining what combination offers the best transportation bargain in moving a particular shipment. We think that carriers should be encouraged to use as simple a method of tariff publication as possible, *and should be discouraged from permitting the kind of situation illustrated. It is also clear that the general practice by which railroads and their affiliates trip lease trailers to shippers for immediate use in TOFC service contains potential seeds of discrimination.* Unless the same opportunity to lease equipment is made available to all similarly situated shippers at the same price, the leasing of a trailer to a favored shipper can become a concession violative of the Elkins Act." [Emphasis supplied]

Inasmuch as appellees have referred to the Commission's decision in Ex Parte No. 230 it is worthy of note that in that case, in contrast with the decision here, the Commission said that the transportation services held out to the public by a carrier are not determined by the words of a particular tariff alone and that whatever a carrier in fact does for a shipper becomes a part of its transportation service and thereby subject to the requirements of the Act. At pages 370-371 the Commission said:

"We must point out here that we are not holding that the service which a carrier holds out to perform can only be ascertained from the actual words of its tariff. When a rail carrier offers a ramp-to-ramp TOFC service, ostensibly confined to the line-haul rail transportation of loaded highway trailers tendered at its terminal by shippers, but then proceeds to lease trailers, and to provide drayage, loading, and other 'accessorial' services, we think that it is *in fact* holding out a complete

door-to-door service. In such a case, all the services it provides become *transportation* services rather than mere accessorial services, and they are required to be the subject of its tariff publications. This, we think, disposes of the New York Central's argument that we have no authority to require the publication of accessorial services. To agree with the Central's position would be to allow any carrier, by self-imposed limitations contained in its tariffs, to designate what it considers to be transportation services and what it considers nontransportation services.[3] This distinction is, we believe, a matter of fact and not one that can be imposed by fiat. The nature of piggyback—the fact that its advantage lies in its being a combination of rail and motor transportation—makes rail carriers tend to offer to their customers services which were traditionally provided only by motor carriers and which can physically be performed only with motor vehicles. Such services, we believe, will normally be transportation services when offered in connection with TOFC transportation."

What the Commission overlooked in Ex Parte 230, and refused to recognize in the decision here under review, is that when the railroads hold out a complete service at one rate and a partial service at a completely different and unrelated rate and offer to supplement the partial service with the equipment and services necessary to accomplish the complete service, they effectively establish a common carrier holding out to do exactly the same thing for two different charges and this, appellees respectfully submit, is a blatant viola-

[3] The thrust of the decision below is that the carriers' tariffs conclusively determine the question. [J.S. 8a-12a]

tion of the Interstate Commerce Act.[4] This is also the reason that Section 15(13) [49 U.S.C. § 15(13)] provides *the* method by which the charges of carriers may be varied to reflect performance by a shipper of some portion of the service which the shipper may lawfully call upon the carrier to perform.

Contrary to the assertions of the appellees, this case presents a vital issue of first impression, for heretofore no decision has interpreted the Interstate Commerce Act as permitting any carrier to apply different charges for the same services dependent upon which of two tariffs it chooses to utilize.[5] Neither has any decision interpreted the Act as permitting a reduction in a charge where the amount of the reduction bears no relationship to the only facts which warrant its imposition, i.e. performance by a shipper of a part of the service. Intervenors, at page 7 of their motion, refer the Court to *National Motor Freight Traffic Associ-*

---

[4] See Section 6 of the Act [49 U.S.C. § 6] requiring the establishment of *a* rate for *a* service and the assessment of *that* rate and no other.

[5] Neither of the cases cited by the Government at page 6 of its motion (footnote 5), *Interstate Commerce Commission* v. *Detroit & C. Ry. Co.*, 167 U.S. 633 and *United States* v. *Interstate Commerce Commission*, 352 U.S. 158, stand for the proposititon that a carrier may simultaneously maintain a single rate which includes line-haul and accessorial services and separate charges for line-haul and the same accessorial services. Neither does the decision of the Commission in *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 531 (1945), cited by intervenors at page 8 of their motion and referred to by the Commission in its decision (J.S. 78a) stand for the proposition that one carrier may maintain different rates for different levels of the same service. In that case the issues grew out of rail rates which did not include pick-up and delivery service that were lower than motor carrier rates which did include such service.

ation, Inc., et al. v. *United States, et al.*, 371 U.S. 223 (1962) and 372 U.S. 246 (1963) and declare that in that case three different sets of rates were approved for a freight forwarder where the highest rate applied for complete service and the other two rates for lesser services. Reference to the decision of the Interstate Commerce Commission (306 I.C.C. 535, and 311 I.C.C. 773), which was sustained by this Court, in the foregoing case discloses that the freight forwarders there involved had established a single set of rates and were proposing a schedule of reductions from those rates to reflect the performance of certain services by the shippers themselves. Those reductions were in effect allowances within the meaning of Section 415 of the Interstate Commerce Act [49 U.S.C. § 1015], the counterpart for freight forwarders of Section 15(13) [49 U.S.C. § 15(13)] which applies to railroads. The decision in the *National Motor Freight* case turned upon issues which are not here involved, but it is abundantly clear that the case *does not* stand for the proposition that a regulated carrier may maintain different rates for a complete service and for portions of that service.

One final matter requires comment. The intervenors insist that the issue of whether or not Plans III and IV violate Sections 2, 3, and 6 of the Interstate Commerce Act [49 U.S.C. §§ 2, 3, 6] and the Elkins Act [49 U.S.C. § 41] because preference, prejudice, discrimination and rebating are inherent therein is of no importance because the court below concluded that the plans themselves do not include such practices and are offered to all shippers who wish to take advantage thereof. But the fact that the court below reached an erroneous conclusion does not render the issue unimportant. Rather, it makes it imperative that the issue

be correctly decided. While the Plan III and IV tariffs do not include within their four corners affirmative provisions for preference, prejudice, discrimination or rebates, the question posed cannot be decided on such an isolated basis. Those tariffs name charges for TOFC service which are a part of the general railroad rate structure which also includes rates for complete TOFC service. The railroads having equipped themselves to perform complete service, and the Commission having made findings of fact that in connection with Plan III and IV charges the railroads do furnish equipment and service not covered by those charges, it is sheer sophistry to hold that opportunities for preference, prejudice or discrimination are not inherent in the tariff publications.

Moreover, it is clear that the fragmentation of charges for TOFC service between Plan II tariffs, Plan III tariffs and Plan IV tariffs, is diametrically opposed to the purpose underlying the Interstate Commerce Act which is to forbid *all* schemes, plans or devices by which discrimination, preference, prejudice or rebates might be accomplished.[6] As this Court said in *United States* v. *Baltimore and Ohio R. Co.*, 333 U.S. 169, 175 (1948):

> "The Interstate Commerce Act is one of the most comprehensive regulatory plans that Congress has ever undertaken. The first Act, and all amendments to it, have aimed at wiping out dis-

[6] *Cleveland, C.C. & St. L. R. Co.* v. *Dettlebach*, 239 U.S. 588 (1916); *Southern R. Co.* v. *Prescott*, 240 U.S. 632 (1916); *Union Pacific R. Co.* v. *Goodridge*, 149 U.S. 680 (1893); *Louisville & N. R. Co.* v. *Mottley*, 219 U.S. 467 (1911); *Louisville & N. R. Co.* v. *United States*, 282 U.S. 740 (1931); *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344 (1940); and *Kansas City S. R. Co.* v. *United States*, 282 U.S. 760 (1931).

> criminations of all types. New York v. United States, 331 U.S. 284, 296, and language of the broadest scope has been used to accomplish all the purposes of the Act. United States v. Pennsylvania R. Co., 323 U.S. 612, 616. It would be strange had this legislation left a way open whereby carriers could engage in discriminations merely by entering into contracts for the use of trackage. In fact this Court has long recognized that the purpose of Congress to prevent certain types of discriminations and prejudicial practices could not be frustrated by contracts, even though the contracts were executed before enactment of the legislation. See Philadelphia, B. & W. R. Co. v. Schubert, 224 U.S. 603, 613, 614; Louisville & N. R. Co. v. Mottley, 219 U.S. 467, 483, 485, 486."

It would indeed be strange if the Interstate Commerce Act had left a way open whereby carriers could engage in discrimination merely by entering into separate tariff contracts for the provision of facilities and services with some shippers while requiring others to accept a single contract and a single published tariff rate. Yet the Commission and the court below have found that such a door is open. It is therefore of the utmost importance for this Court to now declare with finality whether the Interstate Commerce Act is as totally ineffective as the decision below would render it.

CONCLUSION

Appellants respectfully submit that the questions posed by the decision below are of extreme public importance and require plenary consideration by this Court. Therefore, appellants request that the Motions to Affirm be denied.

Respectfully submitted,

KENNETH E. MIDGLEY
1500 Commerce Building
Kansas City 6, Missouri

THOMAS J. HOGAN
1450 Wabash Avenue
Terre Haute, Indiana

LEGRAND A. CARLSTON
4045 Pecos Street
Denver 11, Colorado

BRYCE REA, JR.
917 Munsey Building
Washington, D. C. 20004

ROLAND RICE
HOMER S. CARPENTER
JOHN S. FESSENDEN
618 Perpetual Building
Washington, D. C. 20004

Attorneys for Appellants

September 8, 1964

APPENDIX A

APPELLANTS

COOPER-JARRETT, INC.

EASTERN EXPRESS, INC.

EASTERN MOTOR DISPATCH, INC.

KRAMER BROS. FREIGHT LINES, INC.

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC.

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.

REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.

THE EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC.